

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PAUL C. BOLIN,) Case No. C.V. F-99-5279-REC
)
Petitioner,) <u>DEATH PENALTY CASE</u>
)
vs.)
) ORDER SETTLING EXHAUSTION
Steven W. Ornoski, As Acting) STATUS OF AMENDED PETITION AND
Warden of San Quentin) ESTABLISHING SCHEDULE FOR
State Prison,*) COMPLETION OF CASE MANAGEMENT
) PHASE II
Respondent.)
)

I. Background

Petitioner Paul C. Bolin ("Bolin") filed his Amended Petition for Writ of Habeas Corpus ("Amended Petition") on January 19, 2005. Respondent Steven W. Ornoski, As Acting Warden of San Quentin State Prison (the "Warden") filed his Answer to the Amended Petition on June 17, 2005. Initially, the Warden maintained that four claims in the Amended Petition were unexhausted. Following a telephonic "meet and confer" between counsel for the parties, the Warden concurs that the Court already has ruled on three of these four claims, finding the exhaustion requirement satisfied in an order issued November 28, 2000 regarding the original petition (which presented the same three claims). In the parties' Joint Statement Re: Exhaustion, the

* Steven W. Ornoski is substituted for his predecessor, J.D. Stokes, as Acting Warden of San Quentin State Prison under Federal Rule of Civil Procedure 25(d).

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1 exhaustion status of but a single allegation remains in dispute. By
2 this order, the Court determines that the exhaustion requirement as
3 to the Amended Petition is satisfied.

4 **II. Applicable Law Governing Exhaustion.**

5 Preliminarily, the Court notes that the parties do not dispute
6 the scope of the applicable law governing exhaustion. To satisfy the
7 exhaustion requirement, a habeas petitioner must either "fairly
8 present" his federal claim to the highest state court with
9 jurisdiction to consider it, *Duncan v. Henry*, 513 U.S. 364, 365-66
10 (1995), or demonstrate that no state remedy remains available, *Harmon*
11 *v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1992). A federal claim has
12 been fairly presented in state court when the petitioner has alleged
13 both the operative facts and the federal legal theory upon which the
14 contention is predicated. *Gray v. Netherland*, 518 U.S. 152, 162-63
15 (1996). A federal claim may be considered unexhausted if it includes
16 newly developed factual allegations which were not presented to the
17 state courts. *Hudson v. Rushen*, 686 F.2d 826, 830 (9th Cir. 1982).
18 New factual allegations, however, do not render a claim unexhausted
19 unless they "fundamentally alter the legal claim already considered
20 by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).
21 The exhaustion requirement applies to claims, and does not separately
22 require complete "evidence exhaustion." *Correll v. Stewart*, 137 F.3d
23 1404, 1414, n. 9 (9th Cir. 1998). The petitioner bears the burden of
24 demonstrating exhaustion of state remedies. *Williams v. Craven*, 460
25 F.2d 1253, 1254 (9th Cir. 1972).

26 **III. The Warden's Contentions.**

27 The present exhaustion dispute centers around Claim G which
28 alleges that the prosecutor purposely removed Hispanic prospective

1 jurors from Bolin's jury panel by exercising peremptory challenges
2 during jury selection. The claim asserts both trial error, for the
3 trial court's failure to require the prosecutor to explain his
4 allegedly discriminatory jury selection practices, and ineffective
5 assistance of counsel, for trial counsel's failure on the same score.
6 The Warden submits that Claim G of the Amended Petition is partially
7 unexhausted because Bolin failed to challenge in the California
8 Supreme Court the prosecutor's use of a peremptory strike to excuse
9 prospective juror Janice Lucas. Claim G alleges that the prosecutor
10 improperly utilized peremptory strikes to remove prospective jurors
11 Burciago, Romero, and Cordova. Claim G then names several other
12 prospective jurors with Hispanic surnames alleged to have been
13 "[p]reviously" excused, including prospective juror Lucas. The Warden
14 points out that contrary to this allegation, in fact, Ms. Lucas was
15 removed based on the prosecutor's peremptory challenge; she was not
16 previously excused on a financial hardship or for cause. The Warden
17 maintains that the alleged improper removal of Ms. Lucas on the
18 grounds of her Hispanic status is a separate basis for Bolin's claim
19 for relief, and that it is unexhausted.

20 **IV. Bolin's Contentions.**

21 In response, Bolin points out that Claim G does not allege an
22 improper prosecutorial peremptory challenge based on the removal of
23 prospective juror Lucas. In both the state court pleadings and the
24 Amended Petition, the only improperly challenged prospective jurors
25 identified are jurors Burciago, Romero, and Cordova. Bolin further
26 argues that reference to Ms. Lucas in the Amended Petition adds merely
27 evidentiary support to the underlying legal claim.

28

1 **V. Analysis.**

2 After carefully reviewing the parties' Joint Statement, the
3 Amended Petition, and the applicable state pleadings, the Court finds
4 that the Amended Petition is fully exhausted. Contrary to the
5 Warden's argument, a claim which is not alleged in the Amended
6 Petition cannot be the subject of an exhaustion dispute. Yet, this
7 is the Warden's position; he is asking the Court to find that Claim G
8 is not fully exhausted because of the existence of a factual
9 allegation which could have been, but was not alleged.

10 The Court does agree, however, with the Warden in one important
11 respect. If Bolin were to have alleged that Ms. Lucas had been
12 removed improperly from the jury panel on the grounds of the
13 prosecutor's allegedly racially motivated peremptory challenge, that
14 allegation would be the type of additional fact which adds a new sub-
15 claim to the Amended Petition. It is more than a mere evidentiary
16 fact. This follows because if the prosecutor could supply neutral
17 reasons for his strikes of the three named Hispanic prospective
18 jurors, but could not with respect to Ms. Lucas, there might possibly
19 be a basis for relief under Bolin's theories of trial error and
20 ineffective assistance of counsel (for failure to call into question
21 the prosecutor's misconduct). Other than noting the factual
22 separateness of a claim alleging an improper strike of a prospective
23 juror, the Court declines further comment on the viability of Claim
24 G or any of its components. This ruling resolves the exhaustion
25 dispute regarding the Amended Petition.

26 **VI. Next Phase of the Litigation.**

27 Ordinarily, the determination that a petitioner has on file a
28 fully exhausted petition, as here, signals the culmination of Phase

1 II of capital habeas litigation in this Court. See Guide to Case
2 Management and Budgeting in Capital Habeas Cases ("Attorney Guide"),
3 ¶ 53. In the instant action, however, Bolin's counsel, who are newly
4 appointed as of July 12, 2005, have not completed their review of the
5 entire case file, and therefore have not yet committed themselves to
6 move forward with the litigation in its present form. Bolin has not
7 ruled out the possibility of seeking a further amendment to the
8 Amended Petition to add additional allegations which may then have to
9 be exhausted before the California Supreme Court.

10 The Court looks upon this course of action with great disfavor.
11 Prior federal lead counsel, Ms. Jolie Lipsig, is viewed by the Court
12 as highly competent and thorough. If she missed any allegations when
13 preparing the Amended Petition, the Court is confident they are minor
14 allegations not likely to give rise to any independently actionable
15 claim. In the event that Ms. Lipsig overlooked a truly compelling
16 federal claim, Bolin should so advise the Court without delay.
17 Otherwise he should move forward into the next phase of the
18 litigation. Recent Supreme Court case authority supports the Court's
19 view that Bolin and his present counsel should press forward with the
20 litigation in the condition the case file and pleadings have been
21 presented. First, application of the doctrine of relation-back under
22 Federal Rule of Civil Procedure 15(c)(2) has become extremely narrow
23 after the high Court's ruling in *Mayle v. Felix*, ___ U.S. ___, 125 S.
24 Ct. 2562 (2005). Unless any new claim Bolin may allege arises out
25 of the same operative facts, in "both time and type" as facts alleged
26 in the Amended Petition, that claim could be time-barred. See *id.* ___
27 U.S. at ___, 125 S. Ct. at 2571. Second the decision in *Rhines v.*
28 *Weber*, ___ U.S. ___, 125 S. Ct. 1528 (2005) imposes restrictions on

1 the discretion of courts to hold federal proceedings in abeyance
2 during the state exhaustion of new federal claims.

3 Nonetheless, before launching this action into Phase III, see
4 Attorney Guide, ¶ 57, the Court will allow Bolin another six weeks to
5 complete review of the case file. No later than November 12, 2005,
6 a full four months after appointment of his new counsel, Bolin shall
7 inform the Court whether he intends to file a motion to amend the
8 Amended Petition under Federal Rule of Civil Procedure 15(a). If so,
9 he shall file his motion forthwith. In no event will the Court accept
10 a motion to amend the Amended Petition later than December 12, 2005.
11 If Bolin chooses to go forward with the pleading prepared by and under
12 the supervision of Ms. Lipsig, he shall notify the Court and schedule
13 a Phase III Case Management Conference.

14 As fully described in the Attorney Guide, Phase III of capital
15 habeas litigation involves briefing of the petition, whereby the
16 petitioner prepares a comprehensive memorandum of points and
17 authorities in support of the claims alleged, the Warden prepares a
18 comprehensive memorandum of points and authorities opposing the claims
19 alleged, including the development of any affirmative defenses, and
20 the petitioner prepares a traverse responding to the arguments
21 advanced in the Warden's opposition brief. The parties are advised
22 that the issue of procedural default will be treated as an affirmative
23 defense, and, accordingly, will not be addressed prior to the Court's
24 review of the merits of the operative petition. In addition to merits
25 briefing, Phase III is dedicated to fact development discovery,
26 including discovery motions, and briefing of the petitioner's request
27 for an evidentiary hearing. All of these briefing issues will be
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1 addressed at the Phase III Case Management Conference, at such time
2 as it is scheduled.

3 IT IS SO ORDERED.

4 **Dated: September 29, 2005**
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/s/ Robert E. Coyle
UNITED STATES DISTRICT JUDGE